Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, et al., Petitioners,

-vs-

THE TOWNSHIP OF SOMERFORD ET AL., Respondents,

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, et al., Petitioners,

-vs-

THE STATE OF OHIO, DEPARTMENT OF TRANSPORTATION, AND NINO CAVALIERE Respondents,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

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42 pp

QUESTIONS PRESENTED

WHETHER, THE FOURTEENTH AMENDMENT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAW PROTECTS PETITIONERS FROM THE STATE'S VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS THAT DIRECTED THE DECISION OF THE OHIO SUPREME COURT BY ITS ENACTMENT OF AMENDED SUBSTITUTE HOUSE BILL NO. 350, THAT DEPRIVED THE OHIO SUPREME COURT OF ITS JURISDICTIONAL APPELLATE AUTHORITY OVER PETITIONERS' MEMORANDUM IN SUPPORT OF JURISDICTION THEN PENDING IN THE OHIO SUPREME COURT, DEPRIVING PETITIONERS OF A FAIR AND IMPARTIAL HEARING IN THAT COURT OF THEIR QUEST FOR A TRIAL, ARISING FROM THE COURT OF CLAIMS SUMMARY JUDGMENT IN FAVOR OF THE STATE AGENCY, ODOT, AND THE STATE'S POLITICAL SUBDIVISIONS?

WHETHER, THE FOURTEENTH AMENDMENT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAW, PROTECTS PETITIONERS' RIGHTS UNDER THE BILL OF RIGHTS, OF THE OHIO CONSTITUTION § 16, ARTICLE I, ENTITLING THEM IN THEIR SUIT AGAINST THE STATE AGENCY IN THE STATE COURT OF CLAIMS, TO HAVE THE RULES OF LAW APPLICABLE TO PRIVATE PARTIES CONTROL THE ADJUDICATION OF THEIR ACTIONS?

WHETHER, THE FOURTEENTH AMENDMENT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAW PROTECT PETITIONERS, FROM THE STATUTORY AND JUDICIAL REIMPOSITION OF SOVEREIGN IMMUNITY LAW

CONTROLLING THE ADJUDICATION OF THEIR ACTIONS AGAINST A STATE AGENCY AND THE STATE'S POLITICAL SUBDIVISIONS IN THE STATE COURT OF CLAIMS, FOLLOWING THE ENACTMENT OF §16 ARTICLE I OF THE OHIO CONSTITUTION, THE STATE'S STATUTORY WAIVER OF ITS SOVEREIGN IMMUNITY AND ITS JUDICIAL ABOLISHMENT AS TO POLITICIAL SUBDIVISIONS "TO THE EXTENT IT WAS ROOTED IN COMMON LAW"?

WHETHER, PETITIONERS' COMMON LAW AND STATUTORY RIGHTS OF LIABILITY FOR NUISANCE AND NEGLIGENCE ASSERTED AGAINST STATE RESPONDENTS AND SUPPORTED BY MATERIAL SUMMARY JUDGMENT EVIDENCE IN THE OHIO COURT OF CLAIMS THAT GUARDRAIL WAS LOCATED IN PART, ON THE PAVED SHOULDER OF INTERSTATE HIGHWAY I-70 UPON WHICH RESPONDENT DRIVER MADE CONTACT WAS ONE OF THE PROXIMATE JOINT AND CONCURRENT CAUSES OF PETITIONERS DEATHS AND INJURIES, ARE PROTECTED UNDER THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF LAW OF § 16, ARTICLE I OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION FROM SUMMARY JUDGMENT, BECAUSE AS A MATTER OF OHIO LAW IT IS A TRIALABLE ISSUE UNDER PETITIONERS' FACTS AND THE AUTHORITY OF ADKINS V. VILLAGE OF ONTARIO (1983), 8 OHIO ST.3d 45, 457 N.E.2d 317?

LIST OF PARTIES

PETITIONERS:

JAMES KNISKERN, ADMINISTRATOR OF THE ESTATES OF CYNTHIA ANN CAVALIER, JENNIFER KNISKERN, & FELINA CAVALIERE;

GUY CAVALIERE;

JOANNA CAVALIERE & MARIA CAVALIERE, MINORS, BY AND THROUGH THEIR FATHER AND NATURAL GUARDIAN, GUY CAVALIERE

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO;

ALLSTATE INSURANCE COMPANY

RESPONDENTS:

THE TOWNSHIP OF SOMERFORD, TRUSTEES:

WALTER BETHEL
DAVID DAHUME
JAMES MORAN

THE COUNTY OF MADISON, COMMISSIONERS:

HERBERT C. MARKLEY
ROBERT EDWARDS
JOE D. YODER

NINO CAVALIERE

WESTERN RESERVE MUTUAL CASUALTY INSURANCE CO

THE STATE OF OHIO

THE STATE OF OHIO DEPARTMENT OF TRANSPORTATION (ODOT)

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REASONS FOR GRANTING THE WRIT

I.

The Ohio Supreme Court and the Ohio Court of Appeals, Tenth Appellate District decided and created Fourteenth Amendment Federal, and Section 16, Article I, State constitutional due process and equal protection questions that have not been, but should be decided by this Court, because the State of Ohio has embarked on a policy of misuse of State governmental powers by reimposing through legislative and judicial action, utilizing both sovereign immunity case and statutory law that was abolished by Section 16, Article I of the Ohio

Constitution' Bill of Rights, judicial decree, and by the State statutorily consenting in Ohio R.C. § 2743.02(A)(1), to have its liablity to Petitioners adjudicated in its Court of Claims in accordance with the rules of law applicable to suits between private parties, and arbitrarily adjudicated Petitioners' wrongful deaths and survivors claims utilizing sovereign immunity law that it had provided as a defense for the highway maintainence duties it had delegated to the Respondents, the political subdivisions, as a legal basis for granting summary judgments in favor of the State Respondents, depriving Petitioners of the applicable substantive state law that is constitutionally protected from sovereignimmunity.....8

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The affirmance by the Appellate Court of the Court of Claims' summary judgment, when the trial judge had adjudicated the contested material facts of Petitioners' experts to reach the decision that the accident site guardrail was not a nuisance as a matter law, wherein the Court ignored the rules of law applicable to suits between private parties articulated in the leading case of Taylor v Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, (1944) deprived Petitioners of their constitutional substantive and procedural due process rights protected both by the entire Section 16, Article I of the Ohio Constitution and the Federal Fourteenth Amendment that can only be vindicated in this Court.....17

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The State of Ohio's reservation and retention of the right to control the outcome of litigation of its liability and the liability of the State Respondents in its Court of Claims by legislative acts, contravenes Section 16, Article I of the Ohio Constitution because it usurps the limited power granted the Legislature to direct the court and manner the state may be sued, in that it permits the state to maintain sovereign immunity over its liability in the Court of Claims through inter alia., by violating the doctrine of separation of powers, an ultra vires act that contravens the State's statutory waiver contained in Ohio R.C. § 2743.02(A)(1), that constitutes a Federal Fifth Amendment taking by the States of Petitioners' wrongful death and survival actions against the State Respondents without just compensation and a deprivation of their state and federal substantive and procedural due process and equal protection of the laws rights, under the Federal Fourteenth Amendment and State's Section 16, Article I Bill of Rights.....24

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

Petitioners pray that writs of certiorari issue to review both the judgment of the Ohio Supreme Court denying Petitioners' Motion for Reconsideration, and its judgment denying certiorari to Petitioners to review the judgment of the Ohio Court of Appeals, Tenth Appellate District, affirming summary judgments in favor of all of the State Respondents and Respondent Insurer. Petitioners further pray that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, Tenth Appellate District, affirming summary judgments in favor of all of the State Respondents and Respondent Insurer.

OPINIONS BELOW

The January 29, 1997 Journal Entry of the Ohio Supreme Court denying Petitioners' Motion For Reconsideration,

pg. A1. The Ohio Supreme Court 12/20/96 Journal Entry declining jurisdiction, pg. A2. The 6/28/96 Opinion and Journal Entry of the Ohio Court of Appeals, Tenth District pgs. A3. The Opinion and Journal Entry of the Ohio Court of Claims dated August 15, 1995 Appdx. pg. A30.

STATEMENT OF JURISDICTION

The judgment of the Ohio Supreme Court declining jurisdiction was entered on December 20, 1996. Petitioners' application for reconsideration was denied by that Court on January 29, 1997. The jurisdiction of this Court is invoked under 28 USCS § 1257(a). Pruneyard Shopping Center v. Robins (1980), 447 U.S 74, 64 L Ed2d 741 at pg. 751, 100 S Ct 2035, holds:

> **"It has long been established that a state constitutional provision is a "statute" within the meaning of § 1257(2)" and "Appeal is thus the proper method of review."**

Martinez v. California (1980), 444

U.S. 277, 62 L Ed2d 481 at 487, 100 S Ct 553, recognizes:

> **"the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause" and "..the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."**

Petitioners as Ohio and U.S. citizens contend that the State action is and has been wholly arbitrary and irrational.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth and Fifth Amendments to the U. S. Constitution pg. A125. § 16, Article I of the Ohio State Constitution at A58.

STATUTORY PROVISIONS INVOLVED

23 U.S.C. §§ 101 & 103; Ohio R.C. §§ 2743.02(A)(1), 2744.03(E)(1), & 2744.02(B)(3); Ohio R. C. §§§ 5535.15, 5591.36 & 5591.37.

STATEMENT OF THE CASE

Petitioners first raised a federal

question in the Court of Claims through expert M. E. Bronstad P.E., p. A42 by his summary judgment affidavit. He stated that ODOT acted independently and under the Federal Highway Safety Act of 1966 by adopting a 30 foot wide clear zone. ODOT had incorporated it into I-70 for the purpose of giving most motorists who errantly encroach on the roadside, an opportunity to recover control of the vehicle and return to the travellway without further incident. He concluded that the accident guardrail was not built according to the plans of the project and was built using an obsolete drawing; that had it been built properly the van in which Petitioners were riding would have been redirected back onto the paved shoulder of I-70 precluding the disaster that occurred. The photographs submitted establish the acident site guardrail is on the paved shoulder where it attaches

to the bridge. See affidavit at pg. A39. Also see affidavit of Joseph P. Meyers registered engineer at pgs. A51.

The Court of Claims improperly weighed the evidence of Bronsted's affidavit against his deposition testimony and concluded that the accident occurred off the paved portion of the highway; that none of the Respondents were liable; that no duty was owed to Petitioners. The Court granted summary judgments in favor of all Respondents except the driver. See pg A36.

On appeal, see opinion A6, Petitioners asserted that the Court was required to apply the definitions of public highway as appears in 23 USCS §§ 101 & 103, in determining whether the accident occurred on the public highway in determining the County and Township duty of to keep the public highways and public grounds in their political

subdivision free from nuisance under R. C. § 2744.02(B)(3). The Appellate Court affirmed in its opinion at pg. A3. It held, at A19, that the guardrail could not be considered a nuisance as a matter of law even if negligently designed finding:

> **"there is no doubt that the guardrail was located outside the regularly travelled portion of the road and that it did not affect the safety of the highway for regular and ordinary course of traffic."**

Petitioners' Memorandum in Support of Jurisdiction filed with the Ohio Supreme Court reiterated the same federal question at A36. After the issues were briefed by Respondents, the Ohio Legislature enacted a series of statutes that repealed the liability of the State's political subdivisions for accidents that occur on the paved shoulder, berm, guardrail, and the Counties duty to provide a suitable

guardrail at wash banks that meet public highways.

Coincidentally it mooted the Petitioners' statutory legal predicate for the appellate review by Ohio Supreme Court, by removing their legal issues that were of great interest and public importance. The Supreme Court declined jurisdiction. Its memorandum order is found at pg. A2.

Thereafter, Petitioners at its earliest opportunity filed with that Court a motion for reconsideration that for the first time raised the issues, at A126, that the State had violated the doctrine of separation of powers, the equal protection and due process issues of the U.S. Fourteenth Amendment, and § 16, Article I of the State's Constitution. The Supreme Court of Ohio denied the motion in its 1/29/97 order A1.

Respondent, Nino Cavaliere, was operating his Chevy van in the lane next to the shoulder proceeding in an easterly direction on interstate highway I-70 in Ohio when his vehicle went straight as an arrow from the curb lane of I-70 to paved shoulder, onto the turndown end, and straight behind and along side the bridge approach guardrail, where it launched off the bridge's wingwall 15 feet down into the creek below. Three passengers died two survived with injury.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. The Ohio Supreme Court and the Ohio Court of Appeals, Tenth Appellate District decided and created Fourteenth Amendment Federal, and Section 16, Article I, State constitutional due process and equal protection questions that have not been, but should be decided by this Court, because the State of Ohio has embarked on a policy of misuse of state governmental powers by reimposing through legislative and judicial action, utilizing both sovereign immunity case and statutory law that was abolished by Section 16, Article I of the Ohio Constitution'

Bill of Rights, judicial decree, and by the State statutorily consenting in Ohio R.C. § 2743.02(A)(1), to have its liablity to Petitioners adjudicated in its Court of Claims in accordance with the rules of law applicable to suits between private parties, and arbitrarily adjudicated Petitioners' wrongful deaths and survivors claims utilizing sovereign immunity law as a legal basis by granting summary judgments in favor of the State Respondents, depriving Petitioners of the applicable substantive state law that is constitutionally protected from sovereign immunity.

Only this Court can vindicate Petitioners' deprivation of their state constitutional rights committed by the State that has embarked upon a course of action to protect itself from liability, by arbitrarily retaining and manipulating sovereign immunity law, abolished by its Constitution, its statutory waiver and, in part, by its judicial decree.

This Court should be committed to do so here, since § 16, Article I and the Fourteenth Amendment are similar.

Justice Stevens in Delaware v Van

Arsdall, 475 US 673, 704, 89 Led2d 674 at pg 699:

> "The emerging preference state constitutional bases of decision in lieu of federal ones is in my view the analytical approach best suited to faciltating the independent role of state constitutions and state courts in our federal system." ""The point is... that a state's constitutional guarantees...were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising tides of federal case law both in method and specfics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the State themselves choose to abandon them and entrust their rights entirely to federal law.""

The State's right to legislate is limited by constitutional limitations. Munn v People of Illinois 94 US 113, 24 L Ed 77 (1877), at p.87:

> "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations."

Petitioners are constitutionally protected by § 16, Article I, that authorizes suits against the state and limits the Legislature to determine the manner and court where it is to be done in accordance with law. The language employed therein, abolished sovereign immunity. It is plain error for the State while sitting in judgment to defeat Petitioners in a summary proceeding by sovereign immunity legislation.

This constitutional right provides:

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

It was found not to be self executing. See the syllabi 1-5, in Krause v State, 31 Ohio St.2d 132, 285 N.E.2d 736, (1972). It was recognized as a viable constitutional right only after the State Legislature, through enabling legislation and its statutory waiver in R.C. § 2743.02(A)(1) created the Ohio Court of

Claims in 1975 that effected a broad waiver of the state's immunity.

In the case of Garret v. Sandusky, 68 Ohio St.3d 139, 624 N.E.2d 704 at pgs. 706-708 (1994), Justice Pfeifer stated after a detailed analysis in his concurring opinion:

"Thus the true intent of the amendment to Section 16, Article I was to abolish sovereign immunity in its entirety."

> **"This true meaning has been ignored by Ohio case law, but should be acknowledged today. Governmental immunity, including municipal immunity, is contrary to the clear meaning and mandate of the Ohio Constitution."**

Sovereign immunity law is not a permissible legislative object under the Ohio Constitution. It was officially acknowledged as judicially abrogated as to political subdivisions by the Ohio Supreme Court in 1982. However, the Ohio Supreme Court has declared that sovereign immunity legislation for political

subdivisions meets the constitutional due process and equal protection rights under both the Fourteenth Amendment and Section 16, Article I. See Fabrey v McDonald Police Department, 70 Ohio St.3d 351, 639 N.E.2d 31 (1994), Syllabus 1-3.

Analysis of O.R.C. § 2743.02(A)(1), reveals that the State of Ohio by law agreed to have its liability determined in its Court of Claims in accordance with the rules of law applicable to suits between private parties.

Private parties do not have the right to access sovereign immunity law as a legal basis for adjudicating their disputes nor to escape liability from a nondelegable duty. See Albain v Flower Hospital, 50 Ohio St.3d 251, 553 N.E.2d 1038 at pg.1047, 3 ALR5th 1006 at pgs. 1019-20,(1990), stating that among the duties considered non-delegable is the duty of a municipality to keep its

streets in repair. This is true for ODOT.

The State, litigating as a private party in its Court of Claims, has a nondelegable duty to maintain the public highways. The liability arising therefrom, remains though it delegated its duty and liabilty to political subdivisions. The State created duties and liability in its subdivisions with respect to the public highways with sovereign immunity laws applicable to them. The State, itself, is liable for breach of those duties. It cannot lawfully shield itself because § 16, Article I does not sanction it; and because the State's waiver of sovereign immunity calls for law as between private parties to determine liability. The apparent distinction of being able to sue political subdivisions in the Common Pleas Courts with a right to a jury trial is extinguished by venue statute R.C. §

2743.03(E)(1) that allows political subdivision defendants to make the State agency, ODOT, a third party defendant and by operation of law cause the transfer a plaintiff's case from the Common Pleas Court to the Court of Claims as occurred in Petitioners' case. See Newton v. Court of Claims, 73 Ohio St.3d 553 at pg. 556, 653 N.E.2d 366 (1995) holding that,

"The Court of Claims is not required to remand a case upon finding that the state is no longer a party."

Consequently, when the State delegates to its political subdivisions the mandamusable ministerial duty to keep the public highways and public grounds in their political subdivision open, in repair and free from nuisance. Liablity under R.C. § 2744.02(B)(3) attaches to both the State and its political subdivisions in its Court of Claims.

The grant of statutory authority to these subdivisions to repair and improve

any public highway or roadway in their jurisdiction under Ohio R.C. § 5535.15 does not excuse the State. After a reasonable time and opportunity, if they fail to do so, neither they nor the State should be exonerated from liability on a sovereign immunity basis **while litigating** in its Court of Claims, in its Appellate Courts or by its State Legislature.

The statutory scheme here is just that, a scheme. It is configured to violate the Petitioners' (and those similarly situated), state constitutional rights to sue the State and to bypass the rules of law of liability applicable to suits between private parties. Litigating in accordance with laws applicable to private parties the State is liable for its own torts. Here it designed, created, installed and maintained by ODOT and its political subdivisions on I-70 for more than 20 years an unsuitable nuisance

bridge approach guardrail. The State cleverly delegated its non-delegable duty. The State has unconstitutionally thus far, successfully used sovereign immunity defenses as a shield for its own liability.

II. The affirmance by the Appellate Court of the Court of Claims' summary judgment, when the trial judge had adjudicated the contested material facts of Petitioners' experts to reach the decision that the accident site guardrail was not a nuisance as a matter law, wherein the Court ignored the rules of law applicable to suits between private parties articulated in the leading case of Taylor v Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, (1944) deprived Petitioners of their constitutional substantive and procedural due process rights protected both by the entire Section 16, Article I of the Ohio Constitution and the Federal Fourteenth Amendment that can only be vindicated in this Court.

The State of Ohio has by its statutory delegation of its highway common law duties made the political subdivision Respondents by substantive law, liable to Petitioners for the

accident site guardrail under Ohio R.C. § 2744.02(B)(3) and Ohio R.C. § 5535.15, for failure to keep the public highways and public grounds in their political subdivisions "open, in repair and free from nuisance". Their liability extended

> **"to the conditions of the right-of-way that directly affect the highway's safety for the regular and ordinary course of traffic".**

See Mfrs. Natl. Bank v Erie Cty. Road Comm. 63 Ohio St3d. 318, 587 N.E2d 819 at 823, (1992).

Ohio R.C. §§ 5591.36 & 5591.37, required that the county commissioners:

> **"protect by suitable guardrails all perpendicular wash banks more than eight feet in height where such banks have an immediate connection with a public highway other than state highways or are adjacent thereto in an unprotected condition",**

Under R.C. § § 5535.15, they had the statutory authority plus a reasonable time to fix the accident site bridge approach guardrail that was on the paved

shoulder of Interstate Highway I-70. Their breach was a joint and concurrent proximate cause of Petitioners' wrongful deaths and personal injuries. Adkins v Village of Ontario, infra, precluded summary judgment as a matter of law under these circumstances.

The Courts below deprived Petitioners'of their substantive and procedural due processs and equal protection of laws rights under both the Fourteen and Fifth Amendment and § 16, Article I of the Ohio Constitution.

Because photographs, established the guardrail, in part on the paved shoulder of the roadway where it was connected to the bridge, Petitioners had good cause to believe that together with other issues of great public importance that they had raised, that the Ohio Supreme Court would grant Petitioners Memorandum of Jurisdiction because of its

decision in the Adkins v Village of Ontario, 8 Ohio St.3d 45, 457 N.E.2d 317 at pgs. 319, 320, (1983) that stated:

> **"Instead, we find that it is a question of fact for the jury to determine whether the guardrail was located close enough to the highway to impose a duty under the statute.**
>
> **Another question that cannot be properly determined by summary judgment is whether the condition of the guardrail constituted a nuisance."**

In Strunk v Dayton Power & Light Co., 6 Ohio St.3d 429, 431, 453 N.E.2d 604,(1983), the Court acknowledged that a municipality's duty and liability extended to the portion of the highway considered the berm or shoulder.

The Court of Claims and the Court of Appeals held that the accident site guardrail was not a nuisance as a matter of law and no duty was owed Petitioners.

Petitioners were denied the opportunity to have a fair and impartial hearing on their Memorandum in Support of Jurisdiction because in October of 1996

effective 1/27/97 the Ohio State Legislature repealed the law of nuisance as it applied to political subdivisions and removed their liability for the paved shoulder, berm and guardrail portions of the road. It also removed the duty of Counties to provide a suitable guardrail at wash banks at public highways.

The State Legislature's enactment of Amended Substitute House Bill No. 350 altering its statutory liability to Petitioners, violates their due process and equal protection, since it is contemporaneously judging its own liability while changing the rules that determine it, when it is legally bound to having its liability determined in the Court of Claims in accordance with the rules of law applicable to suits between private parties. This type of due process is irrationally absurd and arbitrary.

The State specifically exploited

soverign immunity defenses by repealing every issue of statutory liability that Petitioners had relied upon in their filed Memorandum of Jurisdiction for Ohio Supreme Court review, under its grant of appellate jurisdiction. Ohio Const. § 2, Article IV(B)(2)(d), requires the case to be of public or great general interest in order to sustain jurisdiction. The Ohio Supreme Court was compelled to take judicial notice of the Amended Substitute House Bill No. 350's passage to make a good faith determination of its jurisdiction. Though it is in violation of the separation of powers doctrine, the Ohio Supreme Court was compelled to decline to review Petitioners' mooted issues for lack of its appellate jurisdiction, depriving Petitioners of a fair and impartial due process hearing in that Court under the 14th Amendment.

Usery v. Turner Elkhorn Mining Co.,

428 US 1 at pg. 17, 49 L Ed2d 752 at pg 767, 96 S Ct 2882 (1976), states:

> **"The retrospective aspects as well as the prospective aspects must meet the test of due process, and the justification of the latter may not suffice for the former."**

In the case of Federal Deposit Insurance Corporation v Meyer, 510 US___ 127 L Ed2d 308, 114 S Ct 996 (1994), this Court recognized the significance of the "private-person" element as a controlling aspect of tort law, noting that that the Court is hesitant to engraft language from the private-person element of § 1346(b) onto the sue-and-be-sued clause because the tort liability arising under the Constitution generally does not apply to private entities.

In the Petitioners' case, the sovereign state of Ohio specifically adopted the statute, Ohio R.C. § 2743.02(A)(1), that its liability is to be determined by the rules of law

applicable to suits between private parties. Rules of law of sovereign immunity are not applicable to those type of suits.

III. The State of Ohio's reservation and retention of the right to control the outcome of litigation of its liability and the liability of the State Respondents in its Court of Claims by legislative acts, contravenes Section 16, Article I of the Ohio Constitution because it usurps the limited power granted the Legislature to direct the court and manner the state may be sued, in that it permits the state to maintain sovereign immunity over its liability in the Court of Claims through inter alia., by violating the doctrine of separation of powers, an ultra vires act that contravens the State's statutory waiver contained in Ohio R.C. § 2743.02(A)(1), that constitutes a Federal Fifth Amendment taking by the States of Petitioners' wrongful death and survival actions against the State Respondents without just compensation and a deprivation of their State and Federal substantive and procedural due process and equal protection of the laws rights, under the Federal Fourteenth Amendment and State's Section 16, Article I Bill of Rights.

The Respondent, Ohio Department of Transportation was liable under Ohio

common law for its failure to afford the Petitioners a safe means for travel on Interstate Highway I-70 in accordance with the purpose it was designed and built. That liability "extends to conditions in the right-of-way that directly affect the highway's safety for the regular and ordinary course of traffic" when ODOT built a man made wash bank, contrary to Ohio's public policy stated in Ohio R.C. § 5591.36.

ODOT then utilizing an unsafe and obsolete design, installed an unsuitable bridge approach guardrail at the accident site that did not correspond to its official standard construction drawings adopted by ODOT before the approval of the construction plans or to the one installed at the same time at an adjacent bridge on I-70 that had incorporated those official plans. It made no effort to modify it for more than 20 years.

It was one of the joint and concurrent proximate causes of the wrongful deaths and personal injuries Petitioners sustained, there being no evidence other than the doctrine of res ipsa loquitur to establish driver negligence. It was a denial of substantive and procedural due process and equal protection of laws under both the Fourteenth Amendment Fifth and Section 16, Article I of the Ohio Constitution.

Thus far, the United States Supreme Court has not decided, but should decide, the Fourteenth Amendment substantive, procedural and equal rights federal question of whether Petitioners' rights under § 16, Article I of the Ohio Constitution Bill of Rights vested common law and statutory rights enabling them to sue the State in the Court of Claims and hold it to the law applicable to private

parties? Whether Petitioners were protected constitutionally by the abolishment of sovereign immunity judicially in Ohio, and from the statutory and judical reimposition of sovereign immunity following the State's waiver? Whether the particular laws that were embodied in Amended Substitute House Bill No. 350 relating to the separation of powers issue deprived the Supreme Court of Ohio of its constitutional juridictional base to grant Petitioners a fair and impartial hearing on their Memorandum in Support of Jurisdiction?

State Respondents failed to perform their mandatory nondiscretionary statutory duty to provided a suitable guardrail. Such failure without legal justification is ipso facto arbitrary for 14th Amendment due process purposes. See Nicoletti v Brown, 740 F. Supp. 1268, (1987).

CONCLUSION

As stated in the dissent of Jones v State Board of Education of Tennessee, 397 U.S. 31 at pg. 34, 25 L. Ed 2d 27 pg 29, 90 S Ct 779, (1970):

> **"The doctrine that a government, state or federal, may not grant a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights is now well established"(citations omitted).**

Why should Petitioners have to relinquish their the right to win their wrongful death suits against the State Respondents in its Court of Claims by the State unconstitutionally depriving them of the applicable substantive law available to private parties. Petitioners right to sue the State cannot not be conditioned upon the nullification of their constitutional rights under § 16, Article I of the Ohio Constitution.

The State's legislative delegation of its highway maintainence nondelegable

duties to its political subdivisions along with sovereign immunity defenses that are applicable for litigation purposes in the Court of Claims, deprives Petitioners of their § 16, Article I and 14th Amendment due and equal protection rights.

The retainage by the State to statutorily alter the, Respondents', political subdivisions' liability by expanding their sovereign immunity defenses at a critical point in the State's litigation as a party, and its retainage of the case law developed thereunder, functions as an unreasonable means of advancing the State's interest to exonerate itself from its legal liability under the applicable private party rules of law in its Court of Claims.

The law applicable to suits between private parties precludes the

State as a party, to direct the decision of the Ohio Supreme Court in Petitioners case by removing its jurisdiction.

The State's ultra vires action usurped its constitutional authority by sovereign immunity legislation when under the law, it is limited to choosing the court and manner it may be sued in accordance with law. The ultra vires act by the State stands as an unconscionable constitutional tort of both the State and Federal Constitutions.

Respectfully, Petitioners therefore pray that their petition for writs of certiorari be granted.

Dated this 28th day of April 1997.

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